Supreme Court, U.S.
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No. (1)

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In The

Supreme Court of the United States

DANNY RAY LEE,

Petitioner,

v.

BURL CAIN, Warden,
Louisiana State Penitentiary,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit erred in denying Danny Ray Lee a Certificate of Appealability about whether reasonable jurists would find it debatable that the district court erred when it found that his habeas corpus petition was time-barred under the one year statute of limitations period in the Antiterrorism and Effective Death Penalty Act [28 U.S.C. § 2244(d)]?

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OPINIONS BELOW

The Order denying a Certificate of Appealability issued by the U.S. Court of Appeals for the Fifth Circuit (App. 1, *infra*) is not reported. The Order denying a Certificate of Appealability issued by the U.S. District Court for the Western District of Louisiana (App. 2, *infra*) is not reported.

STATEMENT OF JURISDICTION

The Order denying a Certificate of Appealability was issued by the U.S. Court of Appeals for the Fifth Circuit on March 25, 2008. Petitioner timely seeks review of this denial under 28 U.S.C. § 2253, in accordance with the jurisdiction of this court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

CONSTITUTIONAL PROVISIONS

The petitioner asserts a denial of his Sixth Amendment right to counsel, in so much as his appointed counsel was "constitutionally ineffective." The Sixth Amendment reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been

committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

FEDERAL STATUATORY PROVISIONS

The underlying habeas corpus petition arises from an assertion of right under 28 U.S.C. § 2254(a), which reads as follows:

> "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

After applying for the petition in the district court, petitioner was denied the requisite Certificate of Appealability under 28 U.S.C. § 2253(c)(1)(A), which reads in pertinent part as follows:

> "(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> (A) the final order in a habeas corpus proceeding in which the detention

> complained of arises out of process issued by a State court . . . "

The reason for denying the certificate of appealability, stated by the United States Court of Appeal for the Fifth Circuit, rests on a procedural requirement under 28 U.S.C. § 2244(d)(1)(A), which reads in pertinent part as follows:

> "(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review . . . "

STATEMENT OF THE CASE

Petitioner Danny Lee was convicted of second-degree murder on April 5, 1995 in the Sixteenth Judicial District Court in the State of Louisiana and sentenced to life imprisonment. Petitioner's direct appeal from the judgment of the trial court was abandoned by his lawyer without petitioner's knowledge or consent. After filing for an extension of the time for appeal, his lawyer did not file a brief and did not inform Mr. Lee of the status of his case. The Louisiana First Circuit Court of Appeals conducted a

patent error review and affirmed petitioner's conviction on August 19, 1996.

After a 231 day lapse (the amount of time it took for Lee to realize that his case had been abandoned), the petitioner filed a pro se application for post-conviction relief in the Louisiana Sixteenth District Judicial Court on May 7, 1997 – which application for relief was denied by the District Court on September 9, 1997. Fifty days later, the petitioner then filed a second pro se application for post-conviction relief in state court, after which undersigned counsel enrolled and filed a motion to convert the pro se application to an out-of-time appeal.

On September 24, 1999, the Louisiana Sixteenth Judicial District Court granted relief on Petitioner's application seeking an out-of-time appeal – granting petitioner another chance at the direct appeal rights he had been denied through his constitutionally ineffective counsel. On February 16, 2001, the Louisiana First Circuit Court of Appeal conditionally affirmed but remanded to the trial court to determine if Lee's trial counsel was ineffective because of a conflict of interest, among other things (See App. 4). On June 24, 2003, the trial judge, Judge deMahy, granted petitioner a new trial based on the constitutional denial of effective assistance of counsel and presentation of new evidence (See App. 3). During hearings at the trial court level, the trial court learned and ruled that Colwart not only initially represented the main witness against Lee, but Colwart had told the witness Coslow to lie to make him a better witness. Then,

Colwart began representing Lee and did not confront Coslow on the lies he, Colwart, had coached Coslow to tell. Based on this, and the fact that Coslow admitted to Judge deMahy that he lied in Lee's trial about the drugs he took before the murder and who committed the murder, Judge deMahy granted Lee a new trial. This was the same trial judge who had heard the trial and sentenced Lee to life in prison. The State proceeded to take a writ opposing the grant of a new trial. The Louisiana First Circuit Court of Appeal, who had conditionally affirmed the out-of-time appeal, now overruled Judge deMahy and said, without reason, that Lee should not get a new trial. This direct appeal process ended when the Louisiana Supreme Court denied Mr. Lee relief on November 24, 2004. Taking the out-of-time appeal as a reinstatement of his direct appeal, his state court judgment became final for 28 U.S.C. § 2244(d) purposes 90 days later, on February 22, 2005.

Mr. Lee then filed a petition for post-conviction relief in the state courts on November 22, 2005, 273 days later. The state collateral action continued in a timely manner, tolling the 28 U.S.C. § 2244(d) clock, until the Louisiana Supreme Court denied Mr. Lee relief on his post-conviction action on May 11, 2007.

Prior to the conclusion of the state court action, on February 23, 2007, Petitioner simultaneously filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 and a Motion to Hold Habeas Corpus Petition in Abeyance in the Western District of Louisiana. On May 18, 2007, seven days after the conclusion of the

state court action, the United States Court for the Western District of Louisiana granted a withdrawal of Petitioner's Motion to Hold Habeas Corpus Petition in Abeyance. At the time of the federal habeas corpus filing, the petition at issue, 280 days of un-tolled time had run since Mr. Lee's state court judgment had become final – February 22, 2005.

On June 1, 2007, the magistrate judge recommended that the habeas corpus petition be denied and dismissed with prejudice, suggesting that the claims were barred by the one-year limitation period of 28 U.S.C. § 2244(d). The Magistrate Judge included in the 28 U.S.C. § 2244(d) time calculation the 281 days that had lapsed un-tolled before the reinstatement of Mr. Lee's direct appeal rights, and before Mr. Lee's direct review was final in the Louisiana Courts on February 22, 2005. On June 26, 2007, Petitioner filed a Response & Objection to the Report and Recommendation of the Magistrate Judge. On June 28, 2007, the United States Court for the Western District of Louisiana denied and dismissed with prejudice the habeas corpus petition of Danny Ray Lee, adopting the recommendation of the magistrate judge.

Petitioner, through undersigned counsel, filed a Notice of Appeal on June 28, 2007; and a Motion to Proceed on Appeal *In Forma Pauperis* on July 10, 2007. On July 11, 2007, the United States Court for the Western District of Louisiana granted the Motion to Proceed on Appeal *In Forma Pauperis* and denied Petitioner's proposed Certificate of Appealability,

citing a failure to demonstrate a substantial showing of the denial of a constitutional right. This decision was appealed to the U.S. Court of Appeals for the Fifth Circuit, where the petition for a certificate of appealability was denied on March 25, 2008, for, as the court stated, "Lee failed to demonstrate that reasonable jurists would find it debatable whether the district court was correct in its procedural ruling."

Mr. Lee now comes before this court asking that the certificate of appealability be granted in the U.S. Court of Appeals for the Fifth Circuit, where Mr. Lee has met his burden under 28 U.S.C. § 2253(c); first, in making a substantial showing that he has been denied a Constitutional right; and second, that reasonable jurists, the other U.S. Circuit Appeals Courts in particular, have disagreed on the application of the procedural rule under which he was denied.

ARGUMENT

Danny Ray Lee was denied his Constitutional right to effective assistance of counsel, according to the standard defined in *Strickland v. Washington*, when Lee's attorney in his second-degree murder trial, Mr. Craig Colwart, (1) previously represented the co-accused during a preliminary hearing and negotiated a plea for him to testify against Lee, and then began representing Lee in the murder case where his former client was the chief witness against Lee. 466 U.S. 668 (1984). The co-accused was also the

only eyewitness to the crime. (2) Mr. Colwart failed to prepare properly for the defense of Petitioner and failed to discover crucial evidence, namely a letter written to the Petitioner by the co-accused and his former client which stated that the co-accused testified falsely at the trial as to which one of them had committed the crime. Colwart did not have an opportunity to receive this piece of evidence because he failed to visit the Petitioner or meet with him to prepare a defense. Colwart also failed to interview the state's key witness, the same co-accused he had previously represented. He also did not cross examine the co-accused about the lies the he told because Colwart had instructed the co-accused to lie in the trial of Danny Ray Lee, Colwart's new client. (3) Colwart failed to file a brief in support of Petitioner's appeal, and failed to inform Petitioner that the appeal had been abandoned.

The procedural issue, and the grounds upon which the U.S. Court of Appeals for the Fifth Circuit denied Mr. Lee's petition for a certificate of appealability, is whether jurists of reason would find it debatable whether the district court was correct in its procedural ruling, when it denied as time-barred Danny Ray Lee's petition for *habeas corpus*, under the one-year limitation period of the Antiterrorism and Effective Death Penalty Act [28 U.S.C. § 2244(d)].

The District court held that the one-year clock started 30 days after Lee was first convicted – September 19, 1996. Mr. Lee asserts that 90 days after the conclusion of direct review granted through the

out-of-time appeal by the District Court is actually the correct date of the conclusion of his direct appeal – on February 22, 2005. Petitioner asserts that the procedure in question, out-of-time grant of a direct appeal, is specifically an issue that the different United States Circuit Courts of Appeal have treated inconsistently, even in respect to essentially the same factual bases. As such, a certificate of appealability should have been issued on the ground that reasonable jurists *have in fact debated* in their interpretation of this particular procedural issue.

A. Actual Time Line of Danny Ray Lee's Appeal Process

Petitioner's direct appeal from the judgment of the trial court was abandoned by his lawyer at the time, Craig Colwart, the same lawyer who represented the witness against Lee and negotiated the plea bargain to testify against Lee. After filing for an extension of the time for appeal, Mr. Colwart did not file a brief and did not inform his client of the state of his case. The First Circuit Court of Appeals conducted a patent error review and affirmed petitioner's conviction on August 19, 1996.

The petitioner filed a pro se application for post-conviction relief in the Sixteenth District Judicial Court on May 7, 1997. This action was taken at the time that the petitioner found out that his case had not been properly handled by his counsel – 231 days passed between the original final judgment date and

the petitioner's pro se filing with the District Court – a tolling event. This first application for relief was denied by the District Court on September 9, 1997.

The petitioner then filed a second pro se application for post-conviction relief on October 29, 1997 – 50 days later. After the second filing and before the court decided the issue, the current counsel, Mr. James Boren, began representing the petitioner and moved for an out-of-time appeal in the District Court. On September 24, 1999, the Louisiana Sixteenth Judicial District Court granted relief on Petitioner's application seeking an out-of-time appeal – granting petitioner another chance at the direct appeal rights he had been denied through his constitutionally ineffective counsel. This direct appeal ended when the Louisiana Supreme Court denied Mr. Lee relief on November 24, 2004. Taking the out-of-time appeal as a reinstatement of his direct appeal, his state court judgment became final for 28 U.S.C. § 2244(d) purposes 90 days later, on February 22, 2005.

Mr. Lee then filed a petition for post-conviction relief in the state courts on November 22, 2005, 273 days of un-tolled time had elapsed. The state collateral action continued in a timely manner, tolling the 28 U.S.C. § 2244(d) clock, until the Louisiana Supreme Court denied Mr. Lee relief on his post-conviction action on May 11, 2007.

Prior to the conclusion of the state court action, on February 23, 2007, Petitioner simultaneously filed a Petition for Writ of Habeas Corpus under 28 U.S.C.

§ 2254 and a Motion to Hold Habeas Corpus Petition in Abeyance in the Western District of Louisiana. On May 18, 2007, seven days after the conclusion of the state court action, the United States Court for the Western District of Louisiana granted a withdrawal of Petitioner's Motion to Hold Habeas Corpus Petition in Abeyance. At the time of the federal habeas corpus filing, the petition at issue, 280 days of un-tolled time had run since the Mr. Lee's state court judgment had become final -- February 22, 2005.

B. Effect of Danny Ray Lee's Out-Of-Time Appeal

In order for the judgment to be final, the process of direct review must be complete. Petitioner asserts that direct review of the judgment was not complete until February 22, 2005; 90 days after the decision to deny the writ of certiorari by the Louisiana Supreme Court. *See Roberts v. Cockrell*, 319 F.3d 690 (5th Cir. 2003) (where the Louisiana Supreme Court held that, " . . . the 'conclusion of direct review' is when the Supreme Court either rejects the petition for certiorari or rules on its merits. [W]e previously held that this includes the ninety days allowed for a petition to the Supreme Court following the entry of judgment by the state court of last resort"). Even though the initial period for direct review seemingly ended when the original lawyer did not file a brief in appeal to the District Court; when the Court granted an out-of-time appeal it reinstated the right to appeal and reinstated direct review of the conviction. The phrase,

'reinstating the right to appeal,' is used by the Louisiana Supreme Court in *State v. Counterman* to explain the nature of the grant of an out-of-time appeal. 475 So.2d 336, 338 (La. 1985).

The Louisiana Supreme Court in *Cockerham v. Cain*, defines when a Louisiana conviction becomes final for purposes of Louisiana law. 283 F.3d 657, 661 (5th Cir. 2002). The Court held that,

> courts [should] treat out-of-time appeals the same as timely filed appeals, thus entitling these defendants to the benefit of rules established before the out of time appeal was resolved.

Id.

C. Jurists of Reason In Fact Debate Whether An Out-Of-Time Appeal Mechanism Restarts the Direct Review of a Conviction

It is clear from the different Circuit Courts of Appeal that reasonable jurists debate on the specific procedural ruling of the District Court in this case. The federal courts of appeal decisions can be parsed in many ways; the question of whether the A.E.D.P.A. classification of 'direct review' rests on state law interpretation or federal law application; whether the person in question ever had an opportunity for direct review; whether he lost that opportunity through no fault of his own; whether to define the nature of the out-of-time appeal by the procedural mechanism used to access the relief or the manner in which it proceeds

after access; and finally how the state actually defines the resulting procedure.

Looking at the different decisions of the courts of appeal, there is a split on whether the state characterization of the out-of-time appeal procedure is determinative, or rather if the federal court should examine the nature of the procedure and make a federal determination thereon. But a categorization of the Courts of Appeal with these terms alone would not give a firm indication of how the courts would decide a case. In fact, given a set of factors involved in the different cases and circuits, there is no clear indication that any particular issue is determinative (see chart at App. 5).

D. Federal Determination – Fifth Circuit, Sixth Circuit and Ninth Circuit

The Fifth Circuit Court of Appeals has recognized, in *Salinas v. Dretke* that an application for an out-of-time Petition for *Discretionary* Review (PDR) in the Texas law, is a post-conviction procedure, and therefore collateral in nature. 354 F.3d 425 (5th Cir. 2004). In *Salinas*, this Court examined the effect of a right to file an 'out-of-time' PDR as it applied under Texas law, and found that the collateral mechanism did not reinitiate the direct review process – despite the repeated contention in the state jurisprudence that the person was returned to the position of a recently convicted defendant. *See Ex Parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997) ("granting

an out-of-time appeal restores the pendency of the direct appeal); *and also Ex Parte Daigle*, 848 S.W.2d 691, 692 (Tex. Crim. App. 1993) (returns a petitioner, "to the point at which he can give notice of appeal.").

The Court reasoned in *Salinas* that the inquiry was not whether the person was returned to 'direct review' status; but that the important issue was the "mechanism by which Salinas obtained the right to file an out-of-time PDR," was collateral in nature. 354 F.3d at 430. The Court held that the A.E.D.P.A. clock was tolled during the out-of-time appeal, but not restarted as a result; because, as the Court defined it, the one-year limitation in the A.E.D.P.A. is 'linear' only and does not allow for a re-starting under any circumstances.

The Sixth Circuit Court of Appeals used essentially the same reasoning in *Lopez v. Wilson* to determine whether a prisoner had a right to counsel during the application for an out-of-time appeal in Ohio (Rule 26(B) application to reopen). The Court determined that Ohio Rule 26(B) was a collateral mechanism, under an interpretation of that procedure in the A.E.D.P.A. framework. 426 F.3d 339 (6th Cir. 2005). The court held that the Rule 26(B) application is a collateral proceeding, and should not restart the A.E.D.P.A. one year limitations clock. The court stated that the Rule 26(B) application can be filed at any time after a final judgment; there is no time limitation in the Ohio law for filing this particular relief, as the court stated, "[a]llowing that statute to be restarted at the convenience of the prisoner

would defeat that purpose [of the A.E.D.P.A.]." *Id.* at 352.

Lastly, the Ninth Circuit used the federal determination reasoning in *Summers v. Schriro* to reach the opposite result. 481 F.3d 710 (9th Cir. 2007). At issue here was Arizona's Rule 32 'of-right' proceeding, where a person pleads to a felony and has not had a 'first round' of direct appeals, but is able to file for the appeal out of the normal time allotted for such action (out-of-time appeal of a plea). The Ninth Circuit reasoned that the *function* of the proceeding in the state was determinative and not the *characterization*, eventually coming to the conclusion that the 'of-right' proceeding was 'direct' in nature. *Id.* at 714. Again, the Court relied on the state law only insomuch as it was an indication of how the proceeding actually functioned, and not what is was called. The Court held that Summers' right to file a federal *habeas corpus* petition did not lapse under the A.E.D.P.A. until after the direct review resulting from his Rule 32 proceeding was complete. *Id.* at 717.

The Ninth Circuit has also ruled otherwise in relation to the same Rule 32 proceeding, except in the case that followed, *Hemmerle v. Schriro*, the Court distinguished the defendant therein because he had enjoyed a round of direct appeal. The Court held,

> Hemmerle did not enter a guilty plea which would have forfeited his right to direct appeal. Hemmerle was convicted after a jury trial and was entitled to, *and had*, a full round of direct review. Thus, his Rule 32

> proceedings were not "of right" and are treated as collateral review for A.E.D.P.A. purposes (emphasis added).

2007 WL 2050945 (9th Cir. 2007).

In each of these decisions the Federal Courts have proclaimed to look to the state law not as a determinative factor, but rather as a guide to the nature of the proceeding.

E. State Characterization - Fourth Circuit, Eighth Circuit and Tenth Circuit

The Court of Appeals for the Fourth Circuit held in, *Frasch v. Peguese*, in order to, "determine what constitutes 'direct review' for purposes of 2244(d)(1)(A), we look to state (Maryland) law." 414 F.3d 518, 522 (4th Cir. 2001). The Court found that the *mechanism* for obtaining the right to an out-of-time appeal was collateral in nature, but the *proceeding* that followed was a part of the direct review process – specifically rejecting the approach of the Fifth Circuit in *Salinas*, because as the Court cited, the proceedings are separate. *Id.* at 522. The Court relied not on its determination of the nature of the state procedure, but rather on how the state treated the procedure that followed the granting of the out-of-time appeal.

> The nature of the review engaged in by the Court of Special Appeals is the key to determining whether the review was direct or collateral, and it is Frasch's procedural posture *in that court after he was allowed to file the*

> *application* that is a factor in determining the nature of review (emphasis in original).

Id. at 524.

In this proceeding under Maryland law, after Frasch's application was granted he was; (1) granted a new finite deadline [30 days] for seeking review; (2) he was not restricted to challenging his conviction in one of the four types of claims available under the Maryland Uniform Post-conviction Procedure Act, but rather had the full measure of appellate review at his disposal; (3) the available decision options of the Court of Special Appeals was the same as if Frasch had filed by the original deadline; and (4) finally after being denied his direct appeal, he was able to pursue a full collateral proceeding without facing the successive bar to post-conviction proceedings of someone who had already filed and received post-conviction relief. *Id.* at 522-525.

In examining the procedural posture, the Fourth Circuit followed the reasoning in *Orange v. Calbone*, where the Tenth Circuit made a similar determination based on a similar set of factors used in the *Frasch* decision. 318 F.3d 1167 (10th Cir. 2003). The Court in *Orange* specifically states that the determination of whether a state procedure is 'direct' for purposes of the A.E.D.P.A., " . . . a federal court must defer to underlying state court characterization of procedure." *Id.* at 1170. The Court does not give up its ability to interpret the application of federal law to this case; it merely looks to the manner in which the

state court defines its proceeding, and the manner in which the person proceeds therein.

The Court looks at substantially the same four indices as the *Frasch* court; (1) new finite period for filing – ten days granted in *Orange*; (2) the type of pleadings/claims available – a full merits review in *Orange*; (3) the position of the person as appellant, as opposed to petitioner; and the decision from the court styled as 'affirmed' or 'reversed', typical of a direct appeal; and (4) lastly, the full range of post-conviction relief still available despite the procedural bar to successive petitions. *Id.* at 1171.

The Court also makes an additional distinction within the Oklahoma law, the out-of-time appeal can either be direct, in the case that the defendant had been denied a direct appeal through no fault of his own, or collateral. In *Orange*, the defendant qualified for a direct out-of-time appeal and the Court held that the § 2244(d)(1)(A) clock did not start until this direct appeal was complete. The distinction is important because the Court can answer one of the challenges to this A.E.D.P.A. ruling, that somehow affording those who are granted an out-of-time appeal rights to federal *habeas corpus* proceedings undermines the intent of the law. It has been stated that the purpose of the A.E.D.P.A. is to, "further the principles of comity, finality and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). It is not a threat to the 'finality' purpose of A.E.D.P.A. to allow in very limited circumstances, where a state court finds that a person has been denied a right of direct appeal, the

time limitation of § 2244(d) to restart – congruent with the actual finality of the state court judgment.

F. The Louisiana Law Analysis and *Lee v. Cain*

The factors considered by each of the Circuits in determining whether or not the proceeding are direct or collateral are simple questions of procedure. This examination by the Circuit Courts is necessary, as this Court has instructed in *Carey v. Saffold*, that the proper manner to apply "a federal statute that interacts with state procedural rules [is to] look to how a state procedure functions, rather that the particular name that it bears (citations omitted)." 536 U.S. 214, 223 (1999). The factors to determine whether or not the review is direct in nature are; (1) a new finite time for filing an appeal; (2) nature of the claims available; (3) other concurrent proceedings available; (4) right to counsel during the proceedings; (5) the nature of the decisions available; and (6) the nature of the available procedures that follow.

We are left to look at the Louisiana law and determine whether the proceeding following a grant of an out-of-time appeal specifically comports with a direct or collateral procedure, following the factors used by the Circuit Courts: (1), the granting of an out-of-time appeal in Louisiana results in a finite time to file the appeal in the appellate court; (2), in the proceeding following a grant of an out-of-time appeal, the Louisiana defendant is in the same procedural posture as that of a direct appeal, and only in

exceptional circumstances may offer new evidence; (3), as the out-of-time appeal is granted in the Louisiana courts, any concurrent collateral attacks must be dismissed, as the judgment is treated as no longer final for the purpose of a post-conviction action; again, the Courts treat the proceedings as a direct attack on a *non-final judgment*; and (4), the accused has a right to counsel during the reinstated appeals process in Louisiana. The right to counsel after an out-of-time appeal is not an exception to the Constitution, but rather a practice consistent with the Sixth Amendment right to counsel during the direct review process. *Counterman*, 475 So.2d at 340.

Danny Ray Lee's right to appeal was reinstated through an out-of-time appeal; the nature of the procedure that followed was direct and not collateral. The Louisiana Supreme Court in *Counterman* interprets the 'grounds' for relief provision of the Louisiana Code of Criminal Procedure, Art. 930.3, and holds that it,

> . . . does not expressly provide for the specific form of relief to be granted . . . the court arguably has the inherent authority to grant the limited relief of an out-of-time appeal (as opposed to the usual relief of a new trial in successful post conviction applications). Moreover, the spirit of Article 930.3(1) . . . also entitles the applicant to the more limited relief of reinstatement of his right to appeal . . .

Id. In the Louisiana law, the motion for an out-of-time appeal is a collateral attack on the judgment precisely

because it is a motion against a final judgment. However, the appeal rights reinstated upon a grant of a motion for an out-of-time appeal is a separate proceeding from the post-conviction relief, the nature of which is a direct attack on the judgment from the lower court.

In *Counterman*, the Louisiana Supreme Court addressed the nature of the Louisiana law regarding out-of-time appeals and held that,

> the appropriate procedural vehicle for a defendant to seek the exercise of his right to appeal, after the delay provided in Article 914 has expired, is an application for post conviction relief pursuant to Articles 924-930.

475 So.2d at 339 (La. 1985). Stating in a footnote referencing this quote,

> when the time for appealing has elapsed without the filing of an appeal, defendant may seek *reinstatement of his right to appeal* by application for post conviction relief in the trial court. [emphasis added]

Id. at Fn. 4.

Using either of the prevailing means to define the manner of A.E.D.P.A. interpretation, state characterization or federal court determination, under the Louisiana law, the proceedings following an out-of-time appeal are without question direct in nature. Under the state characterization analysis, it is clear that the reinstatement of appellate rights under the

Louisiana law, allowed by the grant of an out-of-time appeal, is a direct appeal of the non-final judgment of the trial court. Under the federal court determination analysis, it is clear that the geographic circuit in which Lee was denied his constitutional right to effective assistance of counsel, would be the determining factor in whether he was granted federal habeas corpus relief – a clearly unconstitutional outcome. The § 2244(d) clock should start over on the reestablishment of direct appeal rights under the Louisiana law mechanism of an out-of-time appeal.

CONCLUSION

Petitioner was denied his right to a direct appeal through the constitutionally ineffective assistance of his court appointed counsel and was denied a right to file a federal *habeas corpus* petition on the procedural grounds that his petition was time barred under the A.E.D.P.A..

Petitioner applied for and received post-conviction relief in the form of a reinstatement of his direct appeal rights, an out-of-time appeal, which placed him back in the position he was in when denied these rights in the first place. On this direct appeal, the appellate court conditionally affirmed but remanded to determine if Lee received effective assistance of counsel. The trial court determined his representation was shockingly ineffective – his lawyer represented the witness against him, negotiated a

deal for the witness to testify against Lee, coached the witness to lie, and did not cross examine his former client on any of these matters. Plus, the witness admitted he lied at the trial. The trial court granted a new trial which the state then appealed and the new trial was lost.

Reasonable jurists have differed on the very same procedural issue present in this case, and the Fifth Circuit Court of Appeals mistakenly refused Petitioner a certificate of appealability.

With respect to the stated purpose of the A.E.D.P.A., it follows that a state court ruling on the rare exception of an out-of-time appeal, when the defendant has been otherwise denied a right to direct appeal, would equate to a reinstated right to federal *habeas corpus* relief consistent with other persons similarly situated in the direct appeal process. The United States Supreme Court has stated clearly that the purpose of the A.E.D.P.A. and § 2244(d) is to shut the door on 'abusive delay.' *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005). Granting the petitioner a right to federal habeas corpus relief whenever he has been granted an out-of-time appeal, would not serve as an abuse of delay, but rather a fair and equitable interpretation of the purpose of the A.E.D.P.A., and consistent with the due process afforded to the petitioner in the granting of the out-of-time appeal.

For the foregoing reasons, the petitioner, Danny Ray Lee, respectfully requests that this Court instruct the U.S. Fifth Circuit Court of Appeals to issue

a certificate of appealability so that full treatment of the denial of his constitutional right may be presented.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-30659
USDC No. 6:07-CV-339

DANNY RAY LEE

Petitioner-Appellant

v.

BURL CAIN, WARDEN,
LOUISIANA STATE PENITENTIARY

Respondent-Appellee

Appeal from the United States District Court
for the Western District of Louisiana

(Filed Mar. 25, 2008)

ORDER:

Danny Ray Lee, Louisiana prisoner # 353750, was convicted in 1995 of second degree murder and he was sentenced to life in prison. He now seeks a certificate of appealability (COA), arguing that reasonable jurists would debate the district court's dismissal of his 28 U.S.C. § 2254 application as time barred. He also argues the merits of his ineffective assistance of counsel claims.

Lee has failed to demonstrate that reasonable jurists would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). His motion for a COA is DENIED.

/s/ Rhesa H. Barksdale
RHESA H. BARKSDALE
UNITED STATES
CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Danny Ray Lee	**Civil Action 07-339**
versus	**Judge Tucker L. Melancon**
Warden Louisiana State Penitentiary	**Magistrate Judge Methvin**

ORDER

(Filed Jul. 11, 2007)

Before the Court is Petitioner's Affidavit and Motion to Proceed on Appeal *In Forma Pauperis* filed on July 10, 2007 [Rec. Doc. 15] and Proposed Certificate of Appealability [Rec. Doc. 16]. Petitioner's declaration shows no assets. The state of prisoner's account shows that petitioner has a balance of $426.54 on account, that his average monthly deposits are $255.95, and his average monthly balance for the last six months is $146.63. The filing fee for this appeal is $450.00. Therefore, this Court finds that petitioner is a pauper and it is

ORDERED that Danny Ray Lee's Motion to Proceed on Appeal *In Forma Pauperis* [Rec. Doc. 15] is GRANTED.

IT IS FURTHER ORDERED that Danny Ray Lee's Proposed Certificate of Appealability [Rec. Doc. 16] is DENIED because the applicant has failed to demonstrate a substantial showing of the denial of a constitutional right.

THUS DONE AND SIGNED in Lafayette, Louisiana, on this 11th day of July, 2007.

/s/ [Illegible]
Tucker L. Melancon
UNITED STATES DISTRICT JUDGE

STATE OF LOUISIANA
SIXTEENTH JUDICIAL DISTRICT

STATE OF LOUISIANA

VERSUS

DANNY LEE
DOCKET NO. 99-151,291

APPEARANCES:

THOMAS SENETTE Assistant District Attorney St. Mary Parish Courthouse Franklin, LA 70538	COUNSEL FOR STATE
JAMES E. BOREN Attorney-at-Law 830 Main Street Baton Rouge, LA 70802	COUNSEL FOR DEFENDANT DANNY LEE
ROBERT P. FUHRER Attorney-at-Law Indigent Defender Board Franklin, LA 70538	COUNSEL FOR CO-DEFENDANT DAVY COSLOW

TRANSCRIPT OF POST-CONVICTION RELIEF HEARING

(Filed Jul. 28, 2003)

Transcript of all proceedings had and the evidence adduced held in the above numbered and entitled cause on June 24, 2003, the Honorable Paul J. deMahy, Presiding Judge.

* * *

[90] **BY THE COURT:**

I have reviewed the transcript of the trial, pages – the page number, I'm going to refer to is the record page number, not the transcript page number. 413 through 423, some of which deals with the cross examination of Davy Coslow regarding the use of drugs. Initially, he denies using any drugs, then he admits they smoked Marijuana. He denies even knowing that there was any Crank or Crystal Meth, which is the two names for the same drug, were present at any time during the trip. The testimony today by Mr. Coslow is that he told Mr. Colwart about them using Marijuana and Crystal Meth. And Mr. Colwart, although his memory was somewhat sketchy, seemed to recall that he received that information from Mr. Coslow regarding the use of Marijuana and Crystal Meth. And, since he received that information as Mr. Coslow's attorney, he could not confront Mr. Coslow with a prior [91] inconsistent statement regarding the use of Crystal Meth or Crank during the trip, or at the time of the murder. This would, of course, challenge the credibility of Mr. Coslow at trial. And the two witnesses, eyewitnesses, more or less, against Mr. Lee were Mr. Coslow and Mrs. Coslow, and the primary witness being Mr. Coslow who testified that he saw the entire incident. A successful attack on the credibility of Mr. Coslow could affect the outcome of the case. So, I'm going to find that Mr. Colwart's conflict had an adverse impact on the representation of Danny Lee and will grant his motion for a new trial.

I will order Mr. Lee held on a bond of $1,000,000.00 pending the appeal of this decision, and future trial, if necessary.

BY MR. SENETTE:

Your Honor, I'm not entirely sure what the course of action the State would take with regard to whether this is still in the appellate process or whether we would have to file a writ.

BY THE COURT:

Whichever you intend to do. All right. That's what I expect, that the State will either file a writ or an appeal, and that's why I have set the bond pending whatever appeal or retrial occurs.

By granting the new trial, I, in effect, vacate the sentence and previous conviction.

BY MR. SENETTE:

Your Honor, the State moves for a stay of the court's order concerning the respective date of the motion for a [92] new trial.

BY THE COURT:

I will grant a 30 day stay of my order to allow the State to prepare an appeal or writ, whichever is appropriate.

(END OF PROCEEDINGS)

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788 So.2d 452

Court of Appeal of Louisiana, First Circuit.
STATE of Louisiana
v.
Danny Ray LEE
No. 2000 KA 0183.

Feb. 16, 2001.
Writ Denied March 30, 2001.

Walter J. Senette, Jr., Assistant District Attorney, Franklin, for Appellee State of Louisiana.

James E. Boren, Baton Rouge, for Appellant Danny Ray Lee.

Before: CARTER, C.J., FOIL and WEIMER, JJ.

FOIL, Judge.

Defendant, Danny Ray Lee, was charged by indictment with second degree murder, a violation of La. R.S. 14:30.1. After pleading not guilty, he was tried by jury and convicted as charged. He received the mandatory sentence of life in prison at hard labor without probation, parole or suspension of sentence. Defendant appealed, urging two assignments of error.

FACTS

In August, 1994, defendant and three other people, Davey Coslow, Sherry Coslow and Sheila Tibblas, left Oklahoma in a car rented by Tibblas, with the intention of visiting all of the states in the country. Davey and Sherry Coslow were husband and

wife. Defendant and Sheila Tibblas were boyfriend and girlfriend.

While the group was in St. Mary Parish, they stopped at a sugarcane field. According to Davey Coslow, defendant murdered Tibblas while they were at the sugarcane field. Coslow said that defendant first choked her and then stabbed her in the throat. The victim's body was then covered with a piece of old tin and left in a trash pile in the field.

Defendant and the Coslows then continued on the trip, using the victim's checks, forged by Sherry Coslow, to finance their travels. Eventually they returned to Oklahoma where they were stopped for a traffic violation. At the time of the stop, they were still driving the victim's rental car. Police noted that the person to whom the car had been rented had been reported missing and was not in the car when it was stopped. Initially, defendant was arrested only for driving without a license, and Davey Coslow was arrested for possession of marijuana. Sherry Coslow and another woman who was in the car at the time of the stop were released.

Shortly after her release, Sherry Coslow contacted Oklahoma police and told them about the murder of Tibblas. Eventually, Davey Coslow cooperated with police in Oklahoma and told them that defendant had murdered Tibblas. He was taken to Louisiana where he assisted police in locating the victim's body.

ASSIGNMENT OF ERROR NO. 2

In this assignment of error, defendant claims that the trial court's instruction on second degree murder was erroneous in that it failed to include the element of specific intent. He further claims that trial counsel was ineffective for failure to object to the instruction.

La.Code Crim. P. art. 801 dictates that, "[a] party may not assign as error the giving or failure to give a jury charge or any portion thereof unless an objection thereto is made before the jury retires or within such time as the court may reasonably cure the alleged error." Here, the defendant argues that trial counsel's failure to object to the jury charge constitutes ineffective assistance of counsel.

We note initially that a claim of ineffective assistance of counsel is more properly raised by an application for post conviction relief in the district court where a full evidentiary hearing may be conducted. *State v. Hicks*, 554 So.2d 1298, 1306 (La.App. 1st Cir.1989), *writs denied,* 559 So.2d 1374 (La.1990) and 604 So.2d 1297 (La.1992). However, where the record discloses evidence sufficient to decide the issue of ineffective assistance of counsel and that issue is raised on appeal, the issue may be addressed in the interest of judicial economy. *State v. Bourgeois,* 451 So.2d 172, 174 (La.App. 1st Cir.), *writ denied,* 457 So.2d 18 (La.1984). Because defendant has alleged that trial counsel was ineffective for failing to object to the jury charge and the record is sufficient to

review that claim, we will examine the issue of whether the charge was erroneous.

The trial court's instruction defining the crime of second degree murder was as follows:

> Second Degree Murder is the killing of a human being when the offender actively desired to kill or inflict great bodily harm. What Mr. Lee actively desired must be determined in light of ordinary circumstances. It is a question of fact which may be inferred from the circumstances.
>
> So, in order to convict Mr. Lee of Second Degree Murder, you must find that: (1) Danny Lee killed Sheila Tibblas or was a principal in her killing; and (2) He actively desired to kill or inflict great bodily harm.

Defendant points out that the jury instruction regarding the definition of second degree murder did not indicate that the jury had to find that defendant acted with "specific intent" to kill or inflict serious bodily injury. He contends that this omission relieved the state of the burden of proving an element of the offense charged. Defendant asserts that the court's definition creates a crime of "strict liability murder" by effectively eliminating the requirement of specific intent from the definition of the crime.

We disagree. While the words "specific intent" were not used to describe that element of the crime, the definition of specific intent was included in the charge. La. R.S. 14:10(1) defines specific intent as

"that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." The jury was instructed that, in order to find defendant guilty of the crime of second degree murder they must find that he "actively desired to kill or inflict great bodily harm."

Defendant contends that "state of mind" is subjective, while "actively desired" does not refer to state of mind and is objective, rendering the jury instructions defective. He further argues that the omission of the state of mind requirement is not harmless error because the crux of his defense was that he did not have specific intent to kill.

We conclude that the jury instruction complained of here was not erroneous in that it included the definition of specific intent, which is a required element of the crime of second degree murder. Therefore, trial counsel was not ineffective for failing to object to the jury instruction and this assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 1

In this assignment of error, defendant contends that trial counsel was ineffective because of a conflict of interest between his representation of defendant at trial and his prior representation of Davey Coslow, who testified against defendant at trial.

Defendant was indicted for second degree murder. Davey Coslow was charged by bill of information with the crime of accessory after the fact to second degree murder. At all times, the two cases proceeded separately, except at the preliminary hearing when the cases were consolidated for purposes of that hearing only. At the preliminary hearing, both Coslow and defendant were represented by appointed counsel. Craig Colwart of the St. Mary Parish Indigent Defender Board represented Coslow, and Gary LeGros represented defendant. The minutes indicate that, at subsequent proceedings, defendant was represented by Susan E. Kutcher. At trial, defendant was represented by Craig Colwart and Coslow was represented by Gary LeGros.

Defendant filed a motion for an out-of-time appeal, which was granted by the trial court. He then filed a motion for designation of the record, asking that the district court designate the companion case involving Coslow as part of the record on appeal. The district court granted this request. After the record was lodged, appellate counsel noticed that the requested portions of the Coslow case were not included in the appellate record. Defendant filed a motion to supplement the record, this court issued a show cause order, and the parties filed briefs on the motion. Defendant alleged that portions of the Coslow record were needed in order to adequately raise the issue of ineffective assistance of trial counsel based on a conflict of interest between counsel's representation of defendant and his prior representation of Coslow. In

an unpublished decision, *State v. Lee,* 00-0183 (La.App. 1 Cir. 5/5/00), this court found that, in accordance with *State v. Johnson*, 529 So.2d 466, 473 n. 4 (La.App. 1st Cir.1988), *writ denied,* 536 So.2d 1233 (La.1989) and La.Code Crim. P. art. 914.1, it had no authority to receive or review evidence not contained in the trial court record. This court added that even if the record was supplemented as requested, it would not be sufficient to resolve the issue of ineffective assistance of counsel. Such an issue is generally referred to post-conviction proceedings in which, if necessary, both parties can introduce evidence and the validity of the claim can be properly determined. Accordingly, defendant's motion to supplement the record was denied.

Multiple representation does not presumptively result in the ineffective assistance of counsel so as to violate constitutional guarantees unless it gives rise to a conflict of interest. *State v. Castaneda*, 94-1118, p. 11 (La.App. 1 Cir. 6/23/95), 658 So.2d 297, 305. Where there has been no objection to the multiple representation prior to or during trial, defendant must "establish that an actual conflict of interest adversely affected his lawyer's performance" in order to establish a claim of ineffective assistance of counsel in violation of the Sixth Amendment. *Id.,* citing *Cuyler v. Sullivan,* 446 U.S. 335, 350, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980). The mere "possibility" of conflict is insufficient to impugn a criminal conviction; defendant must show that counsel actively represented conflicting interests. A defendant who

shows that a conflict of interest actually affected the adequacy of counsel's representation need not demonstrate prejudice in order to obtain relief. *State v. Castaneda,* 94-1118 at pp. 11-12, 658 So.2d at 305. In *Castaneda*, this court held that actual conflicts of interest that adversely affect counsel's performance must be established by specific instances in the record, and the mere possibility of divided loyalties is insufficient proof of actual conflict.

In the instant case, the record reveals that defendant's trial counsel represented Coslow at the preliminary hearing in which police officers and Sherry Coslow gave evidence. The testimony presented detailed the police investigation into the circumstances surrounding the murder of Sheila Tibblas. The officers and Mrs. Coslow gave information about the statements of Davey Coslow implicating defendant in the victim's death. Mr. Colwart, Coslow's attorney at the hearing, conducted a very brief cross-examination of the state's witnesses and presented testimony of one of the investigating officers from Oklahoma regarding the facts surrounding the discovery of the murder. Neither defendant nor Davey Coslow testified at the preliminary hearing.

Clearly the situation in the instant case gives rise to the possibility of an actual conflict. The fact that defendant and Coslow would present antagonistic defenses was recognized on the record by both defense counsel and the state after the preliminary hearing, and a joint request for severance of the trials was granted. However, without an evidentiary

hearing there is no way to evaluate the propriety of counsel's failure to raise the issue of a potential conflict, of which he was obviously aware, prior to trial. Further, it cannot be determined whether such conflict was waived. As noted previously, ineffective assistance claims are generally relegated to application for post-conviction relief in the trial court, wherein an evidentiary hearing could be conducted. In this case, however, we believe the interest of justice and judicial economy will best be served by resolving the issue at this time. Therefore, we remand the case to the trial court for a full evidentiary hearing on the issue.

DECREE

The defendant's conviction and sentence are conditionally affirmed. The case is remanded to the trial court for an evidentiary hearing on the issue of ineffectiveness of counsel due to conflict of interest. If the trial court finds merit to the claims, it should set aside the conviction and grant a new trial. *See State v. Addison*, 94-2745, p. 3 (La.6/23/95), 657 So.2d 974, 975; *State v. Lemon,* 29,587, 29,588, p. 12 (La.App. 2 Cir. 8/20/97), 698 So.2d 1057, 1064. If the trial court does not find ineffective assistance, defendant may appeal from that ruling. In the absence of such an appeal, the conviction and sentence will be affirmed.

CONVICTION AND SENTENCE CONDITIONALLY AFFIRMED; REMANDED, WITH INSTRUCTIONS.

WEIMER, J., concurs with reasons. WEIMER, J., concurs.

This remand is dictated by the Rules of Professional Conduct of the Louisiana State Bar Association and the circumstances surrounding the representation of the defendant and one of his accusers.

Rule 1.7 of the Rules of Professional Conduct provides:

> Loyalty is an essential element in the lawyer's relationship to a client. Therefore:
>
> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) Each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests unless:
>
> (1) The lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) The client consents after consultation. When representation of multiple

> clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.9 of the Rules of Professional Conduct provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
>
> (b) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Two appointed attorneys, representing the defendant and one of his accusers, switched clients between the preliminary examination and the trial. The trial attorney for the defendant, having represented his accuser earlier in the proceeding, could not help but have divided loyalties. *See* Rule 1.7. The State acknowledges in brief the "record establishes that trial counsel was compelled to cross-examine a state's witness who was a former client[.]" The

defendant's former attorney, with whom he had a relationship of confidentiality,[1] subsequently represented his accuser. At trial, the defendant's attorney is his accuser's former attorney.

The defendant has a right to urge his arguments regarding his attorney's representation in a hearing following the filing of a request for post conviction relief. LSA-C.Cr.P. art. 924 *et seq.* Our remand expedites this hearing to which the defendant is otherwise entitled.

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[1] *See* Rules of Professional Conduct, Rule 1.6 Confidentiality of information.

	5th Circuit Salinas v. Dretke	6th Circuit Lopez v. Wilson	9th Circuit Summers v. Shriro	4th Circuit Frashe v. Peguese	10th Circuit Orange v. Calbone	8th Circuit O'neil v. Kenny
Federal Law Determination	X	X	X			
State Law Determination				X	X	X
Had Direct Appeal		X				
No Direct Prior Appeal	X		X	X	X	X
Mechanism	X	X				X
Function			X	X	X	
Conviction	X	X			X	
Plea			X	X		X
Granted			X	X	X	
Denied	X	X				X